No. 43158-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE LANDS COUNCIL,

Appellant,

v.

WASHINGTON STATE PARKS AND RECREATION COMMISSION,

Respondent,

and

MOUNT SPOKANE 2000,

Intervenor.

REPLY BRIEF OF RESPONDENT WASHINGTON STATE PARKS AND RECREATION COMMISSION

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I. INTRODUCTION

The Lands Council's standing argument fails because it is premised upon nothing more than apprehension that a future proposal to expand the Mount Spokane ski area might ultimately be approved and permitted to the detriment of its members who prefer a less developed form of recreation. The fact remains that the expansion proposal was only conceptual and received only tentative approval by the Washington State Parks and Recreation Commission (Commission). Accordingly, any harm associated with future ski area development is speculative at this stage. Speculation about possible harm does not confer standing to challenge the Commission's early planning actions.

II. ANALYSIS

A. Appellant Lacks Standing

To establish standing, Lands Council must prove (1) that its interests are within the zone of interest protected by the State Environmental Policy Act (SEPA), and (2) that the decision results in injury-in-fact. Harris v. Pierce Cnty., 84 Wn. App. 222, 230, 928 P.2d 1111 (1996). Lands Council concedes this point, but fails to faithfully follow the test with regard to the one government action they have brought before this Court—the Commission's land classification. Instead, Lands Council's reply brief first attempts to shift this Court's attention from an analysis of whether there is any harm arising from the classification decision by making arguments about the potential for harm that might arise from tentative approval of the development concept. Lands Council

did not challenge that decision below and has thus failed to properly bring before this Court. Lands Council then argues that standing is satisfied merely be alleging the existence of a procedural defect in the SEPA actions actually taken by the Commission with regard to its classification decision, but without citing any case that supports elimination of the standing doctrine's injury-in-fact element. Finally, Lands Council argues that the general classification of potential uses harms its recreational interest without providing any compelling basis to conclude that the harm it envisions is anything more than speculation. Ultimately, these arguments fail because (1) the Court must analyze standing in the context of the decision before it, (2) a challenge to an agency process does not eliminate the need to prove injury-in-fact, and (3) the classification scheme does not actually cause harm because it does not authorize any development or preclude existing uses.

1. Only One Decision Is Before This Court

The Commission made two decisions on May 19, 2011. The first decision approved the general land uses that the Commission deemed appropriate for the back side of Mount Spokane. The second decision tentatively approved the limited expansion concept presented by the lessee operating the ski resort on the front of the mountain. That second decision made it clear that the concept would have to be presented as a specific proposal, limited by the mitigation set forth in the mitigated determination of non-significance issued for these preliminary planning actions, including the requirement that any specific development proposal undergo

full review based upon an environmental impact statement (EIS). The second decision also delegated to the director ultimate authority to decide whether to approve the development after considering the required full environmental review. Only the first of these two decisions was challenged by Lands Council in the trial court.[1]

For the purpose of determining Lands Council's standing on the legal issue before this Court—the classification decision—the two decisions must be separated. Lands Council, throughout its reply brief, merges the two decisions.[2] It erroneously characterizes the Commission's tentative approval of the development concept as a final decision by the Commission on the ability to undertake ski area development.[3] In fact, the Commission made clear that ski area development remains nothing more than a possibility that must be reviewed and approved on a project specific basis upon further SEPA review that will involve an EIS. Lands Council attempts to characterize this as a "final decision" because the Commission delegated project specific review to the director. However, the Commission's continued involvement in any final decision to review a specific development project that may be submitted in the future is immaterial to this case and to the issue of Lands Council's standing to challenge the land use classification decision.

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[1] CP 3.

[2] See Appellant's Reply Br. at 2, 10, 11, and 13.

[3] Appellant's Reply Br. at 2: Lands Council states that the "Commission decision was its final action with respect to this proposal." Actually, the Commission decision was not a final action, and it was within its power to delegate decision-making authority to the director to approve or reject the expansion proposal once the proposal was fully developed and after full environmental review. RCW 79A.05.075.

The harm that Lands Council alleges as a basis for standing is a change in the landscape arising from development. But the land classification decision does not actually approve any particular development. Lands Council cannot invoke the Commission's second decision tentatively approving the conceptual development as a basis to assert standing because that decision is not before this Court despite efforts to link the two decisions. Any allegation of concrete harm with the second decision is not justiciable given that Lands Council did not challenge that decision at the trial court level. The decisions are separate, and the impacts of each must be analyzed independently for purposes of standing.

Focusing on the potential for harm arising only from the classification decision as a basis for standing is legally correct, and it does not prejudice Lands Council. If the development concept is ultimately approved by the director and permitted by the various permitting entities, Lands Council is free to allege that a specific change in the landscape is likely. Then, but only then, might Lands Council establish a concrete and imminent injury-in-fact as a basis for standing to challenge that land use decision, by alleging that their recreational interests will be harmed by a changed landscape.

2. There Was No Omission of Process

Lands Council argues that it can establish procedural standing based on its allegation that the mitigated determination of non-significance accepted by the Commission was not legally sufficient. Lands Council's

procedural standing claim fails for two reasons. First, Lands Council fails to show it was legally deprived of a procedural right. Second, Lands Council fails to factually show any concrete injury-in-fact resulting from its alleged deprivation of a procedural right.

The test for procedural standing requires a party to (1) identify a constitutional or statutory procedural right that the government allegedly violated, (2) demonstrate a reasonable probability that the deprivation will threaten a concrete interest of the party, and (3) show that the party's interest is one protected by the statute or constitution. Summers v. Earth Island Inst., 555 U.S. 488, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009). The Summers test requires both a credible allegation of failed procedure and resulting harm. As to the first element, the existence of a statutory procedure, the cases applying this test have involved instances where a statutory procedure was totally omitted. They do not involve allegations that the process was not properly performed. See Summers; Magnolia Neighborhood Planning Council v. Seattle, 155 Wn. App. 305, 230 P.3d 190 (2010); Five Corners Family Farmers v. State, 173 Wn.2d 296, 268 P.3d 892 (2011).

Lands Council's procedural standing argument is not helped by its reference to Magnolia Neighborhood Planning Council v. Seattle. Magnolia does not address procedural injury in the context of standing. In Magnolia, the Court of Appeals addressed standing in the context of representative standing, and held the association had standing because its members could demonstrate injury-in-fact. Relying on Washington

precedent, the court held that members who owned property next to the proposed area to be developed had standing because their property rights would be affected by the development. Id. at 313. With regard to SEPA, the city had argued that no SEPA review was required at that time because its plan for converting the Army Reserve Center into a multi-unit housing development would be considered under subsequent federal review. The court held that the city's plan was sufficiently detailed to be an "action" subject to SEPA review and thus, the city had violated SEPA by failing to perform any SEPA review for the project.

In contrast to the absence of process in Magnolia, there was no failure to perform SEPA review in our case. The Commission engaged in a thorough process during its review and approval of the classification. As required by SEPA, Parks prepared a checklist for the classification proposal. Parks staff issued a mitigated determination of non-significance based on the information available and the controls imposed on future development. The Commission phased environmental review of the separate decision tentatively approving the development concept. The decision to issue a mitigated determination of non-significance for the classification decision does not equate to an omission of statutory process. It was an application of process that Lands Council would like to challenge, but can only do so if it establishes a concrete and imminent injury-in-fact from the classification decision, not the speculative injuries its members fear from future development not authorized by the Commission's classification decision.

The second element requires a showing that the procedural right threatens a concrete interest of the party that is imminently threatened with harm: injury-in-fact. The Summers case, also referenced by Lands Council, demonstrates that the absence of a concrete imminent harm is fatal to an attempt to prove standing. In Summers, an environmental group challenged a Forest Service regulation eliminating comment and appeal of small timber sales for salvage operations. The Supreme Court dismissed the lawsuit on standing because the environmental group could not demonstrate injury-in-fact related to any specific application of the rule: the environmental group had already settled a dispute relating to a particular timber sale, thus that sale could not be the basis of the dispute.

Neither does the Washington Supreme Court decision in Five Corners modify the three-part test set forth in Summers. Indeed, it emphasizes that injury-in-fact remains a separate element that must be proved. In Five Corners, the plaintiff (an organization of farmers) demonstrated a concrete non-speculative injury that would be affected by the deprivation of a procedural right. They sought a declaratory judgment on the meaning of an exemption in the water code as it applied to an existing cattle feed lot [Easterday] providing water for 30,000 head of cattle. They alleged that allowing the feed lot to operate within the statutory exemption, without a permit, would impair the farmers' right to water during periods of water shortage.

The procedural right at issue was the farmers' right to have the Department of Ecology perform an "impairment analysis." Ecology did

not undertake the required analysis because it believed the project at issue was exempt from permit requirements. The Court of Appeals held that the farmers had demonstrated not only that they were deprived of a procedural right, but also that the deprivation would affect a concrete interest: their right to water during water shortages. Five Corners Family Farmers, 173 Wn.2d at 304. The court explained:

> Collin, a member of Five Corners Family Famers and [Center for Environmental Law and Policy], has applied for a permit to drill a new well. Because Easterday's water right established by beneficial use of its permit-exempt withdrawals would have a senior interest, Easterday would have priority to use water over Collin and, if there is insufficient water, Easterday's well would preclude Collin from obtaining a permit. Collin also employs an existing well that draws from either the Wanapum or Grande Ronde aquifer. Collin has a concrete interest in protecting his existing use of water and obtaining a permit to drill a new well.

Id.

The Department of Ecology's impairment analysis was intended to protect the water rights of existing water users such as the farmers; thus, the farmers had a concrete interest in protecting their existing water use and obtaining permits to drill new wells, both of which would be threatened by the feed lots' permit-exempt water withdrawals. The farmers demonstrated procedural standing by alleging both the existence of a statutory procedure that was not performed by the Department of Ecology (the impairment analysis) and a concrete harm to their property right to appropriate water in the future arising from Ecology's failure to

undertake the required impairment analysis. Under Five Corners, Lands Council's procedural standing argument fails because it cannot show the Commission approval of the classification plan produces a non-speculative concrete injury-in-fact.

If this Court were to accept Lands Council's interpretation of procedural injury, the second element of "injury-in-fact" would essentially be eviscerated. Under Lands Council's proposed standard, a petitioner could allege a violation of any procedure as a means to establish standing regardless of how that procedure impacts the petitioner. Courts consistently require a showing that the alleged procedural harm must also imminently threaten a concrete interest.

3. There Is No Injury-in-Fact

The classification alone does not cause any injury because it does not require that anything be done, does not create any right to develop the property, and does not preclude members of Lands Council from using the area in the same way as they do now. The classification decision only approved the type of activities that could potentially occur. By contrast, before any ski area is developed, a concrete proposal must be submitted, undergo further environmental review, and receive approval from the director and the local permitting authority.

In support of its claim that its members will suffer a concrete injury-in-fact, Lands Council suggests the Commission's classification decision paved the way for "clearing of trees, snags, understory vegetation and downed debris." Appellant's Reply Br. at 4. That selective partial

quotation mischaracterizes the decision made. The Commission's classification decision reflects a determination that certain land uses may be considered that would involve the development actions described in the quote. The Commission's land classification decision, however, does not actually approve any specific project or action that changes the existing landscape. The Commission's classification decision actually reads as follows:

> Option 3 would provide a limited number of informal skiing routes through the treed islands between the ski runs. Some clearing of trees, snags, understory vegetation and downed woody debris would be allowed, however, clearing would be limited to that necessary to provide a safe and enjoyable route of travel through these areas while appropriately managing the risk to skiers. A higher concentration of natural features would be left undisturbed to allow natural processes to proceed in the treed ski islands between formal ski runs.

CP 368.

Accordingly, the classification decision reflects a willingness to consider certain land use activities, but only as conditioned by the mitigated determination. The Commission was conscious of potential environmental impacts that may come with specific development proposals. For this reason, the Commission imposed limitations on such impacts to mitigate them in light of numerous environmental reports available to it at the time it approved the classification plan, including that any specific development project be analyzed with a project specific EIS. By limiting future expansion in this manner, the Commission ensured that

most of the area would remain in a natural condition, it set limits on potential development in other areas, and it ensured that that project specific environmental review would occur at an appropriate stage.

Nor does the record support a finding of concrete injury to Lands Council in any other respect. In their declarations, Lands Council members alleged injury in the form of generalized harm to Lands Council's "ability to advocate for other worthy causes" because of this lawsuit and potential disruption of certain members' current use of the potential ski area for backcountry skiing and enjoyment of solitude and native species.[4] The classification plan does not disrupt backcountry skiing or enjoyment of solitude. Only the project specific action for expansion has the potential for such an impact if approved and implemented. But that kind of project consideration will be subject to review once the details are better known and analyzed as specified in the mitigated determination attached to the land classification decision.

Lands Council also claims in its reply brief that the classification will result in loss of forest land. The classification plan, however, does not cause any physical loss of forest because it does not approve any development and, under the plan, most of the area remains in a natural state. At this point, Lands Council alleges only speculative harm arising from the classification plan. Lands Council's threatened injury really relates to the separate development proposal which has not received a final

[4] CP 4, 8.

decision from State Parks and thus is not yet ripe for review. Should that separate proposal be approved and permitted, Lands Council will have its day in court as provided under the Land Use Petition Act.

III. CONCLUSION

This Court should reverse the trial court as to its determination that Lands Council has standing and dismiss the case because the classification does not result in any concrete injury-in-fact to Lands Council. In the alternative, this Court should affirm the trial court's dismissal because the Commission followed the SEPA process set forth in the rules.

RESPECTFULLY SUBMITTED this 5th day of October, 2012.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

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